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No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL SIERRA,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RAYMOND E. LaPORTE
410 Ware Boulevard
Suite 601
Tampa, Florida 33619
(813) 621-4771
Florida Bar Number 045471

Attorney for Petitioner,
MICHAEL SIERRA

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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QUESTIONS PRESENTED

1. Whether a postconviction Motion under 18 United States Code, Section 2255, attacking the trial judgment, to remedy an alleged denial of due process on the appeal from that judgment, may be denied without a hearing.

2. Whether an allegation in a § 2255 Motion, that the Government manipulated two Indictments against the Movant to gain a tactical advantage over the Movant, may be denied without a response, or a hearing, where the factual basis would not be within the files and records or the knowledge of the Trial Judge.

PARTIES BELOW

UNITED STATES OF AMERICA

MICHAEL SIERRA

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OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the Order of the Lower Court which dismissed Petitioner's Motion under 28 United States Code, Section 2255, without a hearing. The Court of Appeals' affirmance was *per curiam* without an Opinion pursuant to Circuit Rule 36-1. No rehearing was requested. A copy of the Order of the Court of Appeals appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1988. The jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law;

STATEMENT OF THE CASE

Michael Sierra filed his Motion under 28 United States Code, Section 2255 to vacate and set aside his sentence and requested the Court to grant him all relief to which he may be entitled.

Sierra had been found guilty by a federal jury on July 18, 1983, in case number 83-26, and was subsequently sentenced to four years. He was convicted of a conspiracy to obstruct interstate commerce by extortion, in violation of 18 United States Code, Section 1951.

An appeal of that conviction was taken to to the United States Court of Appeals for the Eleventh Circuit and the conviction was affirmed on May 28, 1985, with rehearing denied on August 1, 1985. A Petition for Writ of Certiorari to this Court was also subsequently denied on November 12, 1985.

Sierra was again indicted in case number 85-59 and was put to trial before the same Trial Judge that conducted the trial in 83-26. This jury trial resulted in a verdict of acquittal for Sierra as to all Counts.

Ground Two of Sierra's 2255 Motion alleges that the Government manipulated the charges against Sierra to gain a tactical advantage over Sierra, which caused actual prejudice, in violation of due process. Sierra alleged a factual basis for this contention.

In the factual basis Sierra alleged that in his first trial the Government did not provide Sierra with the prior similar acts of which the Government contended they had knowledge. An Affidavit of the undersigned counsel, who was trial counsel for Sierra in both trials, alleged that if the prior similar acts had been disclosed to Sierra there is a reasonable probability that the result of 83-26 would have been different.

The Motion, supported by Affidavit, asserted that rather than charge the similar acts in the first Indictment, the Government manipulated the charges to gain a tactical advantage over Sierra and to impair his ability to mount an effective defense in his first trial. By not charging the similar act offenses in 83-26 "which they ultimately charged in 85-59 the Government was able to keep from the Movant any notice of the 85-59 charges which the Government intended to use against Movant as alleged prior similar acts in 83-26. If Movant testified in 83-26 the Government would have been able to cross-examine Movant without Movant having had the opportunity to prepare for such cross-examination. The Government would thereby get a preview of Movant's testimony should Movant testify in 85-59 and would be able to attempt to "freeze" Movant's testimony about the charges ultimately brought in 85-59 (all the while refusing to divulge any details and thereby attempting to catch Movant unprepared to adequately defend against such similar acts).

Such deliberate manipulation deprived Movant of the effective assistance of counsel in 83-26 in that his counsel was un-

prepared to assist in defending against the prior similar acts should Movant testify in 83-26 and be confronted on cross-examination with such purported prior acts.

Although counsel has a duty to make reasonable investigations and to make reasonable decisions, Movant's counsel was prevented from adequately performing such duty by the tactics used by the Government as described above. Prior to trial in 83-26 Movant's counsel was unable to interview the witnesses or accumulate the evidence ultimately presented in 85-59 (resulting in acquittal), due to the above tactics of the Government. The Movant was subjected to multiple trials involving a single set of facts which placed a needless burden on the Movant and the Courts."

The Trial Judge was also the Judge who considered the 2255 Motion and dismissed the Motion without requiring a response from the Government and without a hearing. Regarding this issue the judge found that the Government did not charge the Defendant in two separate Indictments for the purpose of an unfair tactical advantage.

Sierra had requested reasonable discovery and his attorney, by Affidavit, asserted:

> In this attorney's opinion, if the two Indictments of Movant had been consolidated into one trial, or if the alleged prior similar acts had been disclosed to Movant in 83-26 in time to investigate the allegations, there is a reasonable probability that the result of 83-26 would have been different. The verdict of not guilty in 85-59 supports that opinion. The defense of Movant in 83-26 would have been similar to that in 85-59; the witnesses presented in 83-59 would have been presented in 83-26 and the Movant would have testifed in 83-26 as he did in 85-59.

These were factual matters that did not occur within the Trial Judge's personal knowledge and which do not appear in the files or records of either of Sierra's trials over which the Judge presided. The Affidavit was unrebutted; the discovery request was ignored and the Trial Judge could not have any personal knowledge of the allegations.

In Ground Five of the 2255 Motion, Sierra asserted he was denied due process on appeal in the appeal of his conviction in 83-26. The facts alleged in support were that:

> During oral argument before the Eleventh Circuit on appeal from Movant's conviction in 83-26, the prosecutor announced that an en camera, ex parte presentation had been made to the Trial Court as a foundation for his cross-examination of the Geraci brothers concerning the Vero Beach cocaine conspiracy. Nowhere in the Appellee's brief on appeal was this presentation discussed or disclosed as justification, or as a foundation, for the cross-examination.
>
> Movant does not know the contents of the alleged ex parte, en camera proffer concerning the Vero Beach cocaine conspiracy case and such lack of knowledge prejudiced him in pursuing the appeal he was guaranteed as a matter of right. Attached as exhibits are copies of two letters reflecting this situation."
>
> 2255 Motion, p. 6a.

The cocaine conspiracy was collateral to Sierra's case in-that the only purpose advanced for the prosecutor's cross-examination of Sierra's witnesses (the Geracis) was to attempt to establish their bias against the Government.

The Order of the Trial Judge dismissing the 2255 Motion made no finding whether Sierra had or had not been denied due process on appeal. The Judge could not have made such a finding since he had no personal knowledge of the appeal process; he did not obtain a response from the Government; he did not grant the discovery requested by Sierra; he did not permit an evidentiary hearing; and the prior proceedings in the case did not disclose that Sierra was not entitled to relief.

REASON FOR GRANTING THE WRIT

THE FEDERAL COURT OF APPEALS, BY AFFIRMING THE LOWER COURT'S DISMISSAL OF THE 2255 MOTION WITHOUT A RESPONSE OR A HEARING, HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Review should be granted because the Great Writ of Liberty, the writ of habeas corpus, has been frustrated by the lower court's denial of Sierra's Motion under 18 United States Code, Section 2255, without a response from the Government and without a hearing. The affirmance, without an opinion, by the Court of Appeals, further frustrates the purpose of habeas corpus; deprived Sierra of due process of law; and in effect decided the question in a way in conflict with applicable decisions of this court.

In *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) the claim concerned events that occurred outside the courtroom and had not been brought to the attention of the Trial Judge. This Court noted that a full evidentiary hearing might not be required. This Court added, however, that when the issue turns out to be one of credibility, resolution on the basis of Affidavits can rarely be conclusive.

Sierra's 2255 Motion concerned events that occurred outside the courtroom.

The events occurred in the Court of Appeals when the prosecutor deprived Sierra of due process on appeal by arguing matters that were not in his brief and which concerned an alleged ex parte, en camera presentation to the Trial Judge, of which Sierra was unaware.

The events also occurred in the prosecutor's office wherein the alleged manipulation of two Indictments occurred, in order to obtain a tactical advantage over Sierra.

Although the Trial Judge could not have any personal knowledge of what occurred on appeal, he dismissed the Motion without requiring a response, or Affidavits, or an evidentiary hearing.

The decision in *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) certainly supports the proposition that a postconviction attack on the trial judgment is the appropriate remedy for a frustrated right of appeal. The decision clearly supports Sierra's right to due process on appeal.

Sierra's allegations entitled him to an evidentiary hearing. *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962) held that the petitioner was there entitled to an evidentiary hearing. The case presented a factual dispute that went beyond the record.

This Court concluded that:

> . . . the specific and detailed factual assertions . . . while unprobable, cannot at this juncture be said to be incredible. . . . Accordingly, we think the function of . . . § 2255 can be served in this case only by affording (a) hearing.

In addition, the files and records for the proceedings below would not have reflected what occurred in the Court of Appeals.

In like fashion, the prosecutor's actions in manipulating and timing the filing of the two Indictments against Sierra, so as to gain a tactical advantage from the rules pertaining to similar acts, would not have been within the knowledge of the Trial Judge. Nor would the files and records of the Trial Court contain the information to resolve the allegations by Sierra.

Sierra was found guilty of an offense he has consistently denied. He was denied due process in his first trial and on his appeal. When he subsequently obtained full notice of the allegations against him and could fully defend, he was acquitted.

The failure of the Trial Judge to obtain a response; to even ask for counter Affidavits; and to dismiss without a hearing, continued the deprivation of due process.

The affirmance, without an opinion, in essence conflicts with *Machibroda v. United States, supra*, and continued the denial of due process into the appeal process.

CONCLUSION

For these reasons, and in the interests of justice, this Petition for Certiorari should be Granted. Only then can the Great writ of Habeas Corpus fulfill its historical promise to enforce due process and to prevent conviction and imprisonment obtained in violation of due process.

Respectfully submitted,

RAYMOND E. LaPORTE
410 Ware Boulevard
Suite 601
Tampa, Florida 33619
(813) 621-4771
Florida Bar Number 045471

Attorney for Petitioner,
MICHAEL SIERRA

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3443

D.C. Docket No. 87-180

MICHAEL SIERRA,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(September 27, 1988)

Before ANDERSON and EDMONDSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

AFFIRMED. *See* Circuit Rule 36-1.

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*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL SIERRA,
Plaintiff,

vs. Case No. 87-180-Civ-T-13(B)

UNITED STATES OF AMERICA,
Defendant.
_____/

ORDER

Upon consideration of the grounds raised in Michael Sierra's motion for relief under 28 U.S.C. § 2255, this Court finds that "it plainly appears from the face of the motion and [the] annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court." *See* Rule 4(b), 28 U.S.C. § 2255. Therefore, all grounds asserted by the movant, including:

Ground one — alleging denial of a fair trial and due process because of the government's threatened use of uncharged similar acts and withholding of *Brady* material;

Ground two — alleging governmental manipulation of the charges against the defendant into two indictments for unfair tactical advantage;

Ground three — alleging denial of a fair trial and due process because of the government's cross-examination of the Geraci brothers concerning their involvement in a cocaine conspiracy;

Ground four — alleging denial of due process and fair trial because of the government's failure to provide exculpatory *Brady* material;

Ground five — alleging denial of due process on appeal because of the government's argument that an ex parte, in camera proffer concerning the Geraci brothers' involvement in a cocaine conspiracy; and

Ground six — alleging denial of due process because of this Court's failure to permit effective cross-examination of Jerry Bowmer and Pickens Tally, are summarily DISMISSED and defendant Michael Sierra is hereby notified of their dismissal.

In accordance with the concerns expressed by *Hart v. United States*, 565 F.2d 360 (5th Cir. 1978) (findings of fact and conclusions of law indispensable to appellate review in proceedings for postconviction release under § 2255), this Court, being familiar with the record in both 83-26-Cr-T-13 and 85-59-Cr-T-13, as well as the present motion under 28 U.S.C. § 2255, finds that the government did not unfairly threaten use of uncharged similar acts against the defendant and did not withhold evidence material to the defendant's innocence within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), did not charge the defendant in two separate indictments for the purpose of an unfair tactical advantage, and proffered sufficient evidence of the Geraci brothers' involvement in a cocaine conspiracy to support cross-examination on that issue. The Court further finds that it did not unfairly limit the defendant's cross-examination of government witnesses and the defendant was not otherwise denied a fair trial or due process. Dismissal of the motion under 28 U.S.C. § 2255 is therefore appropriate.

DONE AND ORDERED in Chambers at Tampa, Florida, this 21st day of April, 1987.

/s/ George C. Carr
UNITED STATES DISTRICT JUDGE